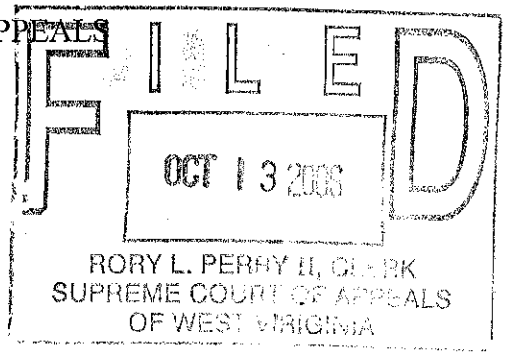
BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33183



DAVID R. KYLE,

Appellant,

v.

DANA TRANSPORT, INC., a New Jersey corporation authorized to do business in West Virginia, and **RONNIE DODRILL,**

Appellees.

Appeal from the Circuit Court of Putnam County, West Virginia

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BRIEF OF APPELLANT

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BRIEF OF APPELLANT

I. Kind of Proceeding and Nature of Ruling Below

On February 3, 2000, Appellant, David R. Kyle, a master electrician, traveled to Appellee Dana Transport Inc.'s (hereinafter "Appellee Dana") property to fix a problem with a breaker. This breaker box is on property owned and operated by Appellee Dana. Upon arriving at Appellee Dana's property, Appellant noticed that someone had already removed the breaker box cover, removed a breaker, and he also noticed that a screw on one of the mounting fingers was

loose. Kyle Depo. at 58-61. A fireball blew up in Appellant's face when he attempted to tighten this screw. In addition to burning his lips, the explosion charred his hands, burned his left ear, burned his corneas, and caused extensive burn injuries to his face and neck. *Id.* at 26-28. For eight or nine months following this traumatic event Appellant had flashbacks in his sleep of a fire erupting in his face. *Id.* at 40-41. Despite seeking psychiatric help, Appellant continues to suffer from these flashbacks. *Id.* at 41.

Neither party has been able to identify what caused the electrical panel to blow up in Appellant's face. Although the electricity to the breaker box had not been shut off, Appellant knew from his forty years of experience that it was not necessary to turn the power off in order to tighten the screw. *Id.* at 68. Specifically, in Appellant's deposition, he testified as follows:

> Q. Why didn't you shut the power off before you did that?
>
> A. Because I didn't see any need to turn the power off.
>
> Q. Why not?
>
> A. Because I saw no danger to it. I have done it for 40 years. I mean, stuff like that is a normal thing, and every electrician does it.
>
> *Id.* at 77.

Appellant further testified:

> Q. What did not having the power disconnected have to do with your injury, other than the obvious, that if the power hadn't been connected there wouldn't have been an explosion?
>
> A. That I don't know either.
>
> Q. You didn't want the power disconnected to do what you were doing anyway, did you?

A. No, not really, because all I was going to do was change a breaker. If I was going to disconnect the whole thing, you know, say if I was going to have to work on a main breaker or something like that, of course, you would have to have the power company come in and shut it down.

Id. at 92.

In fact, Appellant would not have tightened this screw if he thought it was dangerous.

Q. If you thought it was unsafe, you would have called Marine and said, I'm not working here?

A. Right.

Q. Have you ever walked on a job?

A. Yes. I have.

Q. So you have the authority to do that?

A. Yes. I do.

Q. Even if Jay dispatched you with a work order?

A. Even if he dispatched me with a work order. And if I seen it was unsafe I have the right to deny to work on it.

Q. You didn't consider this - -

A. I didn't consider it dangerous, no.

Id. at 91-92.[1]

Prior to the trial of this matter, Appellant requested that his case be allowed to proceed under a *res ipsa loquitur* theory. In February of 2003, both parties submitted briefs on the matter stipulating to certain facts for purposes of the motion. After over two years had passed without Judge Eagloski ruling on the matter, Appellant asked for, and was granted, a writ of mandamus

[1] Additionally, as Petitioner testified, it was his understanding that Appellee, Dana could not shut the power down. *Id.* at 68.

from this Court.

Subsequently, Judge Eagloski ruled against Appellant, and granted summary judgment to Appellees in an order entered January 6, 2006. In his order, Judge Eagloski ruled that Appellant had failed to prove that the event causing Appellant's injuries is of a kind that would ordinarily not occur in the absence of negligence, and other responsible causes, including the conduct of Appellant and third persons, were not sufficiently eliminated by the evidence. Appellant seeks the reversal of this order so that a jury can decide the factual issues presented.

II. Statement of the Facts

In determining if *res ipsa loquitur* could apply to this case, the parties stipulated to the following facts:

1. On February 3, 2000, Plaintiff, David R. Kyle, a master electrician, had been dispatched by his employer, Al Marino, Inc., to examine and repair a problem in the maintenance building owned by Defendant, Dana Transport, Inc., in Nitro, West Virginia.

2. This maintenance building was on property owned by Defendant, Dana Transport, Inc., and the electrical panel examined by Plaintiff was inside the maintenance building.

3. Plaintiff was told that Defendant, Dana Transport, Inc., was having a circuit breaker problem. Prior to the 3rd day of February, 2000, Plaintiff had not performed any prior work on this electrical panel in the maintenance building.

4. When the Plaintiff examined the panel, he saw that the cover on the electrical panel had been removed.

5. Plaintiff noticed the screw was loose on one of the mounting fingers of the breaker and tightened it up.

6. The Plaintiff does not know what happened, but stated the electrical panel blew up.

7. As a result of this explosion, the Plaintiff suffered various injuries.

8. The Plaintiff has been unable to determine a cause for this accident.[2]

III. Issue Presented

Whether the trial court erred in Ruling that Appellant was Not Entitled to Present his Case under a Res Ipsa Loquitur theory where: (1) a fire ball blew up in Appellant's face when tightening a screw on the Appellee's Breaker Box; (2) the Breaker Box was on property owned and Operated by Appellee Dana; (3) none of the parties can Identify what Caused the Explosion; (4) Someone had been tampering with the breaker box prior to Appellant's Arrival; (5) Appellant has testified that he was taking all the necessary precautions and his activities should not have caused a fireball to erupt out of the breaker box; (6) Appellees have not Designated an Expert to Refute Appellant's Testimony; and, (7) any evidence Appellees have asserted to refute an inference of negligence amounts to speculation?

IV. Argument

Appellant Should have been Permitted to use the Doctrine of Res Ipsa Loquitur

Appellant respectfully submits that Judge Eagloski erred in ruling that he was not entitled to present his case under a *res ipsa loquitur* theory where: (1) a fire ball blew up in Appellant's face when tightening a screw on the Appellee's breaker box; (2) the breaker box was on property owned and operated by Appellee Dana; (3) none of the parties can identify what caused the explosion; (4) someone had been tampering with the breaker box prior to Appellant's arrival; (5) Appellant has testified that he was taking all the necessary precautions and his activities should

[2] A diagram drawn by Appellant was also submitted reflecting the appearance of the breaker box and the location of the loose screw.

not have caused a fireball to erupt out of the breaker box; (6) Appellees have not designated an expert to refute Appellant's testimony; and, (7) any evidence Appellees have asserted to refute an inference of negligence amounts to speculation.

Res ipsa loquitur is a device used by litigants to create an inference of negligence when direct proof is not available. All parties to this case concede that the proper test for determining application of *res ipsa loquitur* is found in Syllabus Point 4 of *Foster v. City of Keyser*, 202 W. Va. 1, 501 S.E. 2d 165 (1997). In *Foster*, this Court adopted the Restatement Second of Torts § 328D (1965) when applying the doctrine of *res ipsa loquitur*. Section 328D provides:

> It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.[3]

When these requirements are met, the evidentiary rule of *res ipsa loquitur* permits an inference that the harm suffered by the plaintiff is cause by the negligence of the defendant. Syl. Pt. 4, *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E. 2d 803 (2002).

Judge Eagloski ruled that Appellant failed to satisfy the first two requirements of the *res ipsa loquitur* test . Appellant submits that this ruling was incorrect and will discuss both prongs separately.

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[3] In adopting this standard, this Court noted that it "should ordinarily provide a fairer, broader, and more generally applicable and useful formulation of the rule . . . ." 202 W. Va. at 20, 501 S.E. 2d at 184.

The Event is of a Kind Which Ordinarily does not Occur in the Absence of Negligence

First, Judge Eagloski ruled that Appellant failed to show that this accident was of a kind that would not have occurred in the absence of negligence. Appellant respectfully submits that this conclusion is inconsistent with our common experience and contrary to numerous other courts and legal authority holding that shocks, electrocutions, and other events of that nature simply do not occur absent some negligence. *See*, 27A Am. Jur. 2d Energy and Power Sources §441 ("Actions against electric companies for injuries or death from electric wires, equipment, or appliances frequently afford an opportunity for the well-established doctrine of res ipsa loquitur . . .")[4] *Robison v. Cascade Hardwoods, Inc.*, 117 Wash. App. 552, 72 P. 3d 244 (2003)("We know from general experience and observation that, absent evidence of an act of God, individuals ordinarily do not suffer severe electrical shocks, unless someone has been negligent"); *St. Paul Companies v. Construction Management Co.*, 96 F. Supp. 1094, 1098 (D. Montana Butte Div. 2000) ("It is undisputable that electrical wiring does not ordinarily ignite fires absent negligence.").

Instead of asking the question of whether this is an event which would occur in the absence of negligence, Judge Eagloski made the following analysis:

> In the case *sub judice*, the Plaintiff has not presented any admissible evidence to show that the accident was of a kind that ordinarily would not have occurred in the absence of the Defendants' negligence. The Plaintiff is a certified master electrician who was called to the premises owned by the Defendant in order to repair an electrical problem in the Defendant Dana Transport Inc.'s breaker box. The Plaintiff was notified that the

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[4] An individual owner of land is under the same duty to safeguard against injuries as are electric companies engaged in the transmission of power. *Id.* at §240.

> breaker box was energized and began working on the breaker box with a pair of needle nose pliers. He was tightening a screw with a screwdriver when he was burned by an electrical fire. The Plaintiff notes that the electrical panel had been removed prior to the Plaintiff examining it and that a screw on one of the breaker's mounting fingers was loose. However, the Plaintiff has offered no evidence that this constitutes negligent conduct of the Defendants or that these conditions contributed in any manner to the electrocution of the Plaintiff. **There is a substantial possibility that the Plaintiff's carelessness in performing work on the electrical panel may have been, at the very least, a contributing factor to the accident. Accordingly, the Plaintiff has not shown that the accident was of a kind that ordinarily would not have occurred in the absence of the Defendants' negligence.** (Emphasis added).

Not only does the above analysis fail to address the question of whether electrical panels blow up in the absence of negligence, but it also misapplies West Virginia law. First, Judge Eagloski stated that Appellant did not present evidence that someone tampering with the breaker box caused or contributed to his electrocution, or that this was negligent conduct on the part of the Appellees. In West Virginia, and following the reasoning of the Restatement, the whole purpose of the doctrine of *res ipsa loquitur* is to allow a litigant to recover in the absence of direct proof of negligence. *Foster v. City of Keyser*, 202 W. Va. 1, 9, 501 S.E. 2d 165, 173 (1997) ("[I]n order to prove a *prima facie* case of negligence . . . the plaintiffs were *not* required to prove a specific negligent act or omission . . ."). The fact that Appellant cannot point to a specific instance of negligence on the part of the Appellees is the purpose of having the doctrine. Appellant is not required to prove what specific negligent act or omission caused his injuries. *Foster*, at 9, 173.

Indeed, as this Court noted in *Foster* such an application of the doctrine is inconsistent

with the purpose of the rule, which is to allow a litigant to prove their case through circumstantial evidence. *Id.* at 19, 183. Judge Eagloski's order and his reasoning essentially emasculate the doctrine by making its application nearly impossible.[5]

Other Responsible Causes, Including the Conduct of Appellant and Third Persons, are Sufficiently Eliminated by the Evidence

Next, Judge Eagloski ruled that Appellant had failed to sufficiently eliminate other responsible causes, including his own conduct and the conduct of third persons. Appellant respectfully asserts that this ruling is inconsistent with West Virginia's system of comparative negligence as well as customary legal practice.

In the lower court's analysis, Judge Eagloski stated that there was a substantial possibility that Appellant's carelessness in performing work on the electrical panel may have been a contributing factor to the accident. The court went further to add, "[t]he records show that it is not clear how the electrical panel was maintained nor whom had previously performed work on the panel, suggesting that the conduct of unknown third persons or the Plaintiff himself, could have caused the accident." Appellant respectfully asserts that Judge Eagloski's ruling runs afoul of West Virginia's comparative negligence scheme.

In *Foster*, this Court overturned the previous test for invoking the doctrine of *res ipsa loquitur*. This Court noted the harsh outcomes that resulted from application of the prior test. Before *Foster*, the test for invoking *res ipsa loquitur* was: "(1) the instrumentality which causes

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[5] Judge Eagloski also stated that Plaintiff's own conduct may have contributed to the accident. Plaintiff respectfully asserts that a discussion of that ruling is more appropriate when dealing with the second prong of the *res ipsa loquitur* test; that other responsible causes, including the conduct of the Plaintiff are sufficiently eliminated by the evidence.

the injury must be under the exclusive control and management of the defendant; (2) the plaintiff must be without fault; and, (3) the injury must be such that in the ordinary course of events it would not have happened had the one in control of the instrumentality used due care." Syl. Pt. 2, *Royal Furniture Co. v. City of Morgantown*, 164 W. Va. 400, 263 S.E. 2d 878 (1980).

In discarding the above cited test, this Court noted that one of its flaws was that it in effect implemented the doctrine of contributory negligence, which was discarded in 1979 by *Bradley v. Appalachian Power*, 163 W. Va. 332, 256 S.E. 2d 879. *Foster*, 202 W. Va. 1, 19, 501 S.E. 2d 165, 183.[6] This Court clarified this concept by stating:

> [i]t appears that in the modified comparative negligence context, the language of the *Restatement* formulation of the *res ipsa loquitur* prerequisites, which *inter alia* requires that 'other responsible causes, including the conduct of the plaintiff and third persons, are *sufficiently eliminated* by the evidence' (emphasis added) means that to invoke *res ipsa loquitur*, a party must present evidence from which the jury could find that the plaintiff was less negligent than any other parties whose negligence, however shown, caused or contributed to the accident -- and this showing would be 'sufficient elimination' of the plaintiff's responsibility. *Foster*, 202 W. Va. 1, 501 S.E. 2d 165 at n. 11.

The questions that remains is: What showing must a party make to sufficiently eliminate other responsible causes? This Court has stated that "[a]ll that is required is that the plaintiff produce sufficient evidence from which a reasonable man could say that, on the whole, it was more likely than not that there was negligence on the part of the defendant." *Foster*, 202 W. Va. at 20, 501, S.E. 2d at 184. Judge Eagloski's order is tantamount to ruling that a reasonable juror could not say that it was more likely than not that there was negligence on the part of Appellees.

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[6] This Court also noted that the great majority of jurisdictions that have adopted some form of comparative negligence do not require a party seeking to utilize *res ipsa loquitur*, to be free from fault.

Indeed, Appellant did not ask ***does*** *res ipsa loquitur* apply, but rather ***can*** *res ipsa loquitur* apply. Given the various factual disputes, Judge Eagloski impermissibly intruded on the jury's domain. A reasonable juror could say that it is more probable then not that the Appellees were at fault.

The Restatement (Second) of Torts §328D (1965) provides additional guidance to determine if a litigant has sufficiently eliminated other responsible causes at comment e.

> It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. ***This conclusion is not for the court to draw, or to refuse to draw, in any case where either conclusion is reasonable; and even though the court would not itself find negligence, it must still leave the question to the jury if reasonable men might do so.*** *Id.* (Emphasis added).

Given that the stipulated facts revealed that someone had tampered with the breaker box, located on property owned and operated by Appellee Dana, prior to Appellant's arrival, a reasonable juror could find that it was more likely than not that there was negligence on the part of Appellees. The evidence presented certainly produces a question of fact, whether tampering with the breaker box prior to Appellant's arrival caused the explosion, or whether Appellant tightening a screw caused the explosion. In such cases, "[i]t becomes the jury's function, not that of the trial court, to weigh conflicting evidence and ultimately to choose whether the inference of the defendant's negligence is to be preferred over other competing inferences that are permissible."[7]

West Virginia, as well as numerous other jurisdictions that have adopted some form of comparative negligence have discussed what showing a party needs to present to sufficiently implicate defendants. For instance, at the outset whether a party may rely on *res ipsa loquitur* is

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[7] Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994).

a mixed question of law and fact. *Restatement of Torts* 2d Section 328D [1965]. In *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E. 2d 803 (2002)(per curiam), this Court clarified the respective roles of the judge and the jury in a *res ipsa loquitur* case noting:

> It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. ***It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached.*** 212 W. Va. at 476, 574 S.E. 2d at 808.

As this Court noted in *Foster*, to require litigants to completely eliminate other responsible causes is inconsistent with our comparative negligence system. Additionally, the facts relied on by Judge Eagloski amount to no more then speculation. Nowhere in the record is it even suggested that unknown third parties trespassed onto Appellee Dana's property and tampered with the breaker box.[8] Speculation is not sufficient to rebut the presumption of negligence created in this case. *Royal Furniture Co. v. City of Morgantown*, 164 W. Va. 400, 404-05, 263 S.E. 2d 878, 881 (1980). Indeed, as is typical practice, if either Appellant or Appellees had thought that a third party somehow caused or contributed to this incident, then said third party would have been joined in the suit.

Appellees have asserted, and the lower court agreed that an electrician working on a live breaker box is guilty of contributory negligence. However, they have made this bald assertion

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[8] Additionally, since Judge Eagloski turned the matter into one for summary judgment, he was bound to examine the facts in the light most favorable to Plaintiff. *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E. 2d 755, 758 (1994). The lower court failed to do this by speculating that unknown third parties may have trespassed onto Defendant Dana's property. Rather, in the light most favorable to Plaintiff, an employee or agent of Defendant Dana tampered with the breaker box prior to his arrival.

without any evidence or testimony in support thereof. Appellees do not have an expert in this matter.[9] Rather, they simply state that this was probably the cause of the accident. Again, this is merely speculation, insufficient to overcome the presumption of negligence raised by Appellant.

The Sixth Circuit has addressed this issue in *Morris v. Wal-Mart Stores, Inc.*, 330 F. 3d 858, 860-61 (6th Cir. 2003). In *Morris*, the plaintiff was shopping with her husband in a "Sam's Club" store when she slipped on a puddle of water and fell. At the close of her case-in-chief, the Defendant moved for judgment as a matter of law, asserting that the plaintiff could not rely on the doctrine of *res ipsa loquitur*. The trial court granted the Defendant's motion and dismissed her case.

On appeal, the court discussed what sort of showing a plaintiff must make in order to invoke the doctrine of *res ipsa loquitur*, and what the trial court's role is in determining if the doctrine applies.

> The role of the trial court is to determine whether the plaintiff's evidence is sufficient to permit a reasonable person to infer from the circumstances that negligence attributable to the defendant caused the plaintiff's injury. If the answer is no, the trial court may direct a verdict for the defendant. If the answer is yes, then the plaintiff can weather a motion for directed verdict, and the case will be submitted to the jury for it to decide whether to choose the inference of the defendant's causal negligence or some other permissible or reasonable inference. *Id.* at 860-61.

The court concluded:

> However, where the correctness of granting a motion for judgment as a matter of law is at issue, it is inappropriate to conclude that res

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[9] Based upon comments made by this Court at an earlier hearing, Appellant has retained an expert in this matter to bolster his testimony.

> ipsa loquitur does not apply when factual disputes remain . . . . Because such factual disputes remain in this case, the application of res ipsa loquitur is a question for the jury to decide. *Id.* at 862.[10]

With this framework in mind, and turning to the facts of this case, Judge Eagloski clearly erred in ruling that *res ipsa loquitur* could not apply. Reasonable minds could disagree over the competing factual disputes. Accordingly, summary judgment was inappropriate.

Res Ipsa Loquitur is simply a device a party may use to prove negligence when direct evidence is unavailable. In negligence actions such as this, summary judgment is uncommon because the trial court would have to conclude that no reasonable juror, properly instructed, could find that the defendant failed to exercise ordinary care. *Lambrecht v. Kaczmarczyk*, 241 Wis. 2d 804, 807, 623 N.W. 2d 751, 755-56 (2001)(quoting, *Erickson v. Prudential Ins. Co.*, 166 Wis. 2d 82, 93, 479 N.W. 2d 552 (Ct. App. 1991). As discussed *supra*, a reasonable jury could conclude that Appellees were negligent.

Appellant has shown a *prima facie* case of negligence through the doctrine of *res ipsa loquitur*. As such, reasonable men could find that the Appellees' negligence was more probably then not the cause of Appellant's injuries. Accordingly, Judge Eagloski's order was in error.

V. Conclusion

For all the foregoing reasons, Appellant, David R. Kyle respectfully requests that this court grant this Petition for Appeal, Schedule his Appeal on the Argument Docket, Reverse the

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[10] See also, *Giles v. City of New Haven*, 228 Conn. 441, 444, 636 A. 2d 1335, 1336 (1994)("The court may withdraw a case from the jury only when there is no question as to the existence of the facts necessary to invoke the doctrine of res ipsa loquitur. 'Phrased differently, the question of negligence is one of law for the court only when the facts are not in *any* event or in *any* view of the case susceptible to the inference of negligence sought to be deduced therefrom . . ." (quoting, 57B Am. Jur. 2d 598, Negligence §1931 (1989)).

Order of Judge Eagloski granting summary judgment to Appellees, and Remand this case to the trial court for jury consideration.

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CERTIFICATE OF SERVICE

I, Heather M. Langeland, counsel for Appellant David R. Kyle do hereby certify that a true copy of the attached BRIEF OF APPELLANT was mailed to counsel of record, this 13th day of October, 2006, addressed as follows:

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